EXCEPTION
OPEN MEETING AGENDA ITEM

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BEFORE THE ARIZONA CORPORATION COMMISSION

ORIGINAL

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IN THE MATTER OF DISSEMINATION OF INDIVIDUAL CUSTOMER PROPRIETARY NETWORK INFORMATION BY TELECOMMUNICATIONS CARRIERS	)	**DOCKET NO. RT–00000J-02-0066**
	)	**AT&T'S EXCEPTIONS TO STAFF'S PROPOSED ORDER**

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") hereby submit their exceptions to the Staff's proposed Order attached to the Memorandum to the Commission from the Utilities Division dated September 24, 2004.

I. INTRODUCTION

Staff's Memorandum outlines the purpose and history of the Customer Proprietary Network Information ("CPNI") rulemaking, as does Staff's proposed Order. The proposed Order provides that a Notice of Proposed Rulemaking shall be forwarded to the Secretary of State for publication in the Arizona Administrative Register. The proposed Order also provides that all prior orders of the Commission shall remain in full force and effect until a final rule is adopted.

Staff's Memorandum includes all relevant procedural information, but does not describe and apply the constitutional test the proposed CPNI rule must pass to be a lawful

restriction on speech. This test, when applied, demonstrates that the proposed rule is an unconstitutional infringement on commercial speech. While AT&T does not take issue with the Commission's authority to promulgate rules protecting consumer information where permitted by law, the rule must be lawful. The rule proposed here by Staff is not lawful. It is not a narrowly tailored restriction on speech generated by a careful weighing of the costs and benefits attributed to the restriction.

As a separate, but equally important matter, Staff's proposed Order would also continue in effect a prior order of this Commission that unlawfully imposed new CPNI burdens on telecommunications carriers that were parties to the proceeding which produced the order. This, too, would be an appealable issue should this order be approved as drafted.

II. COMMENTS

A. First Amendment

The Staff's report notes that the Tenth Circuit Court of Appeals vacated the Federal Communications Commission's ("FCC") initial CPNI rule because the rule violated the First Amendment. The Staff also notes that the U.S. District Court in Washington found the Washington Utilities and Transportation Commission's CPNI rule unconstitutional. Staff fails to explain why the First Amendment is relevant to the CPNI rulemaking and why the two courts found the FCC's rule and the Washington Commission's rule violated the First Amendment. Nor does Staff explain what the constitutional ramifications are if the Commission adopts Staff's proposed rule or the constitutional standards that apply in this case. By failing to address these issues one

could incorrectly conclude that Staff's proposal is free of any constitutional infirmities. This would be an incorrect and unwise conclusion.

AT&T has explained the constitutional implications at length in its previous comments[1] and at the September 2004 workshop. However, it is necessary to make several points that highlight the constitutional issues that are not addressed in Staff's Memorandum.

The controlling case on commercial speech is *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n. of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343 65 L. Ed. 2d 341 (1980). The Court summarized its test when reviewing restrictions on commercial speech.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson at 566.

First, no party has argued that commercial speech is not involved or that government restrictions on the use of CPNI do not impact constitutionally-protected commercial speech. Therefore, Staff must show that the government interest is substantial and that the rule directly advances the state interest. Staff also must show that more narrowly tailored restrictions on commercial speech than it proposes would be ineffective in protecting the substantial state interest.

[1] AT&T's Comments on Staff's First Draft – Proposed CPNI Rules dated May 14, 2004, and AT&T's Comments on Staff's Second Draft – Proposed CPNI Rules dated August 27, 2004.

Staff's Memorandum does not address *Central Hudson* test or attempt to apply the *Central Hudson* test to its proposed rule. Furthermore, Staff does not address the legal principles enumerated by the Tenth Circuit Court of Appeals and the U.S. District Court in the proceedings identified by Staff.

The Tenth Circuit stated that "the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest." *U S WEST v. FCC* 182 F. 3d 1224, 1234 (10th Cir. 1999). Merely asserting a broad interest in privacy is not enough. *Id.* "In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." *Id.*, at 1235. The government must also "show that the dissemination of the information desired to be kept private would inflict specific harm on individuals..." *Id.* "A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm." *Id.*

The Tenth Circuit Court, assuming for the sake of argument that the FCC provided a substantial state interest for its CPNI rule and that the regulation directly and materially advanced that interest, reviewed the FCC's rule to determine whether it was narrowly tailored. The Court concluded the regulation was not narrowly tailored.

> Even assuming that telecommunications customer value the privacy of CPNI, the FCC record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy. The respondents merely speculate that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given such notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.

Id., at 1239. It appears to AT&T that Staff's rule also is predicated on the belief that "there are a large number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given [] notice and an opportunity to do so." *Id.* As the Court noted, speculation is not a sufficient basis for infringing on commercial speech. AT&T cannot figure out any other reason for Staff to require verification and annual reminders of opt-out elections.[2] Furthermore, Staff has not provided the Commission with the required calculation of costs and benefits of the proposed rule.

The U.S. District Court's statements in *Verizon* are also relevant.

> [I]t appears as though the WUTC was motivated by consumer complaints regarding the implementation of Qwest's opt-out campaign. Undoubtedly, the Qwest experience did not go well. That experience, however, does not support the proposition that *all* opt-out presentations are flawed. In fact, Verizon's recent experience implementing opt-out in accordance with the FCC rules in Washington stands in stark contrast to Qwest's. Verizon sent out opt-out notices to approximately 700,000 subscribers; 7.5 percent successfully opted out and fewer than 45 subscribers lodged any complaint. Verizon's experience strongly suggests that properly controlled opt-out campaigns can protect consumers from the unauthorized use of CPNI without impacting speech to the extent that the current rules do. That experience, along with the FCC's, demonstrates that regulations that address the form, content, and timing of opt-out notices, when coupled with a campaign to inform consumers of their rights, can ensure that consumers are able to properly express their privacy preferences.

Verizon Northwest Inc. v. Showalter, 282 F.Supp. 2d 1187, 1195 (W.D. Wash. 2003). The District Court found that the Washington Commission's rules were not narrowly tailored. Staff relies on the same justification the Washington Commission relied on and the U.S. District Court found inadequate – customer complaints during Qwest's initial attempt to comply with the FCC's CPNI rule. As far as AT&T can determine, the

[2] Staff's proposed rule would take it one step further – it requires confirmation of express, affirmative opt-in elections by customers.

customer complaints and speculation about customers' state of mind are the only basis of Staff's proposed rule. The courts have held these reasons alone are inadequate to support restrictions of commercial speech.

This is not a case of the Commission adopting a rule that it believes is in the public interest based on comments received from interested parties. A federal appellate court has held that CPNI is "commercial speech" for the purposes of the First Amendment. *U S WEST* at 1233. Accordingly, the burden is on the Staff, and ultimately the Commission, to demonstrate that its proposed rule passes constitutional muster. This burden is on the Staff, even if no telecommunications carriers file comments in opposition to Staff's proposed rule. The Staff "must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment or misappropriation of sensitive personal information for the purposes of another's identity." *Id.*, at 1235. As the Court noted, "[a] general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm." *Id.* However, Staff has not identified *any* harm to individuals in its Memorandum.

The Commission should require Staff to make a showing that the proposed rule is constitutional before the Commission starts down the path of adopting a rule that is, in AT&T's view, an unconstitutional infringement on commercial speech. Taking into account past legal precedent, Staff should be required to show why its rule is narrowly

tailored and "reflects the careful calculation of costs and benefits that [] commercial speech jurisprudence requires." *Central Hudson* at 1239.

B. Staff's Proposed CPNI Rule

Staff's proposed rule has gone through a number of iterations. Although it more closely tracks the requirements of the FCC rule regarding the requirements for the use of the opt-in and opt-out methods, the Staff's proposal still contains more burdensome notification requirements, requires verification of opt-out elections, requires confirmation of opt-in elections, requires annual reminders, and prohibits the use of bill inserts in all but one case – the initial notice.[3] The verifications, confirmations and reminders must be separate from the customer bills.[4]

AT&T addressed all these matters in its previous comments. It will not do so again. The simple fact is, Staff's rule is not narrowly tailored, nor does Staff calculate the costs and benefits of its proposed rule. The U. S. District Court rejected additional requirements imposed by the Washington Commission because the Court found "[t]hat [Verizon's] experience, along with the FCC's, demonstrates that regulations that address the form, content, and timing of opt-out notices, when coupled with a campaign to inform consumers of their rights, can ensure that consumers are able to properly express their privacy preferences." *Verizon* at 1194-1195. Staff has not demonstrated why the existing FCC regulations coupled with a campaign to inform customers of their rights is inadequate.

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[3] AT&T has other objections to Staff's latest rule. *See* AT&T's comments. These are only the most obvious and burdensome.

[4] In AT&T's Comments on Staff's Second Draft (at 9), AT&T pointed out that Qwest publicly stated in a Colorado Qwest deregulation case that the cost of a bill insert would be $30,000 and the cost of a separate mailing would be $700,000, or 23 times more.

Staff has failed to provide any evidence that opt-out is problem, except for the initial complaints. However, the District Court found that a proper opt-out notice can eliminate all but a very few complaints. Staff has not addressed the *Central Hudson* standards,[5] *U S WEST,* or *Verizon.* All of Staff's proposals appear based on the belief that an opt-out election or an express opt-in election cannot be knowingly made by a customer. As the *Verizon* Court noted, speculation is not sufficient to support burdens on commercial speech, nor is the evidence of the initial customer complaints against Qwest's initial CPNI notice.

AT&T believes the Commission cannot make an informed decision to proceed without a Staff analysis of the prior legal precedent and constitutional standards.

C. Decision No. 64375

Because of the complaints received by the Commission regarding *Qwest's* opt-out notice, the Commission addressed the matter of Qwest customer complaints at the January 28, 2002, open meeting. The Commission subsequently initiated an investigation and rulemaking to examine and address CPNI generally. The Commission ordered Qwest and other telecommunications carriers to delay implementation of an opt-out CPNI policy in Arizona until the conclusion of the investigation.

AT&T received no notice from the Commission that the Commission was going to address CPNI generally at the January 28, 2002, open meeting. The agenda appeared to be limited to reviewing the complaints against Qwest. The Commission subsequently enjoined AT&T and other carriers from using a lawful method of obtaining customer approval to disclose, use and access CPNI that was approved by the FCC, without notice

[5] Staff may argue that it can meet its obligation after the rule is published. However, since Staff has the burden of proof, it makes more sense to require Staff to provide a *Central Hudson* analysis before the Commission publishes the rule.

to AT&T, without any evidence of customer complaints against AT&T and without any record that AT&T's use of opt-out was unlawful. Furthermore, not only was AT&T denied notice and opportunity to be heard, the Commission lacks the legal authority to issue injunctions. In this case the injunction is even more egregious because the injunction is a prior restraint on constitutionally-protected speech.

Enjoining carriers from using the opt-out method effectively requires carriers to use opt-in in all cases. The Tenth Circuit held that the FCC rule that required opt-in in all cases was not narrowly tailored and was unconstitutional. The Commission's present order, therefore, is also unconstitutional on its face. Decision No. 64375 also violates the Arizona Administrative Procedures Act. By prohibiting all carriers from using opt-out, the Commission has, in essence, adopted a rule of general applicability without substantially complying with the Administrative Procedures Act. A.R.S. § 41-1001(17). Any rule adopted in violation of the Act is invalid. A.R.S. § 41-1030.

Staff's latest draft Order states that this prior Order shall remain in effect against AT&T. The Commission's earlier decision was entered over two years ago. The rule proposed by Staff is an invitation to a court challenge. During any challenge to the rule AT&T will continue to be enjoined from exercising its constitutionally-protected rights to free speech without any factual or legal basis. AT&T can no longer silently accept this situation and must object to any order that continues to enjoin AT&T from exercising its First Amendment rights to free speech without any factual or legal basis. The Commission should drop any ordering paragraph that perpetuates the previous unlawful order, and the Commission should correct the previous error and affirmatively state that

compliance with the existing FCC rule is sufficient until the Commission adopts lawful CPNI requirements.

III. CONCLUSION

The Commission has the burden of proof in this proceeding. Before the Commission commences the formal rulemaking process by publication of Staff's proposed CPNI rule in the Arizona Administrative Register it should review the constitutional implications of such actions. It makes sense to do the proper analysis before the publication. AT&T believes that such analysis will demonstrate that Staff's proposed rule is not narrowly tailored and would fail the calculation of the costs and benefits that the law requires. The proposed rule will not stand a legal challenge on First Amendment grounds.

Dated this 4th day of October, 2004.

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